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No. 95-422

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDWIN R. O'NEILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the district court abused its discretion by abstaining from resolving certain issues that are currently being litigated before that court in another pending suit in which petitioners have intervened.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 50 F.3d 677. The memorandum opinions and orders of the district court (Pet. App. 23a-37a, 38a-56a) are reported at 849 F. Supp. 717.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1995. A petition for rehearing was denied on June 8, 1995. Pet. App. 57a. The petition for a writ of certiorari was filed on September 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and the Westlands Water District have entered into a water service contract under the federal reclamation laws to provide delivery of water to farmers, including petitioners. Petitioners initiated this action to enforce a 1986 stipulated judgment that required the United States to perform the contract. The district court resolved certain matters in favor of the government and abstained on other issues that are being litigated in another case pending before the same district judge. The court of appeals upheld the district court's rulings.

1. The Department of the Interior's Bureau of Reclamation operates facilities that store and deliver water for irrigation and other purposes in accordance with federal reclamation laws. See 43 U.S.C. 371 *et seq.* Those facilities include the Central Valley Project (CVP), which is situated in California and is the Nation's largest federal reclamation project. This Court's past decisions describe the essential features and operations of the CVP. See *Dugan* v. *Rank*, 372 U.S. 609, 611-614 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-287 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950).

Of relevance here, the Bureau uses Shasta Dam and related CVP facilities in the northern Central Valley to store waters of the Sacramento, Trinity, and American Rivers. The Bureau releases those waters, when needed, into the Sacramento River, which flows south to the Sacramento-San Joaquin Delta. The Tracy Pumping Plant diverts some of the Delta water into the northern terminus of the Delta-Mendota Canal, from whence it travels to the San Luis Reser-

voir and the San Luis Canal, and then to the Westlands Water District. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993).

2. On June 5, 1963, the United States and the Westlands Water District entered into a water service contract providing that each year "the United States agreed to furnish, and the District agreed to pay for," delivery of 900,000 acre-feet of water for use on the District's eligible lands. See Pet. App. 3a. That obligation, however, is qualified by Article 11, which is captioned "UNITED STATES NOT LIABLE FOR WATER SHORTAGE." See Pet. App. 7a-8a. Article 11(a) states in part as follows:

> There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States * * * for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes.

Ibid. Article 11(b) provides in part that

> [i]n the event that in any year there is delivered to the District by reason of any shortage * * * less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account to the amounts paid to the United States by the District for water for said year

in a manner similar to that described in another article of the contract. Article 11(b) further provides:

> To the extent of such deficiency, such adjustment shall constitute the sole remedy of the Dis-

> trict or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

Ibid.

The Westlands Water District, the United States, and others later engaged in litigation concerning the contract and related matters. The parties ultimately agreed upon a stipulated judgment, which was entered by the district court in 1986. Pet. App. 4a. The 1986 judgment states that "the District and the United States shall perform the 1963 Contract" and additionally provides that "[a] party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions," but that, with certain exceptions, such "proceedings against the Federal parties shall * * * be for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment." E.R. Tab 2, at 10-11, ¶¶ 3, 4.1.[1]

3. Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, requires federal agencies to engage in an inter-agency consultation process to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2); see also ESA § 7(b) and (c), 16 U.S.C. 1536(b) and (c). When the so-called "action agency" proposes an activity that is likely to have an effect upon a listed species, that agency must formally consult with the appropriate "wildlife agency," which, depending on

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[1] "E.R.—— " refers to the Excerpts of Record, which petitioners filed in the court of appeals.

the species, is either the Interior Department's Fish and Wildlife Service (FWS) or the Commerce Department's National Marine Fisheries Service (NMFS). The wildlife agency must provide the action agency with a "biological opinion," which consists of a written statement setting forth the wildlife agency's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species. See 50 C.F.R. 402.02, 402.14(h).

On November 5, 1990, the Secretary of Commerce adopted a final rule listing the Sacramento River winter-run chinook salmon, a unique population of chinook salmon that historically spawned in the upper Sacramento River and its headwaters, as a threatened species. 55 Fed. Reg. 46,515. Accordingly, the Bureau of Reclamation entered into a Section 7 consultation with NMFS. Pet. App. 4a. On February 12, 1993, NMFS issued a biological opinion finding that the Bureau's proposed long-term operations of the CVP would jeopardize the winter-run chinook salmon. *Ibid.* The opinion concluded, however, that the jeopardy could be avoided if the Bureau placed certain limitations on the CVP operations, including limitations on Tracy Pumping Plant diversions. See *id.* at 4a-5a.

On March 5, 1993, the Secretary of the Interior listed the delta smelt, a fish species indigenous to the Sacramento-San Joaquin Delta, as a threatened species. 58 Fed. Reg. 12,854. Accordingly, the Bureau and FWS entered into a Section 7 consultation. On May 26, 1993, the FWS issued a biological opinion addressing the Bureau's proposed CVP operations criteria and plan for the 1993 water year. That biological opinion found that the proposed 1993 CVP operations, which included, among other things, modifications in accordance with the NMFS bio-

logical opinion, were not likely to jeopardize the continued existence of the delta smelt. Pet. App. 5a.

4. In the meantime, Congress in 1992 had enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4706-4731, which is intended to achieve, among other things, "a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." § 3402(f), 106 Stat. 4706. The CVPIA amends the CVP's authorizing statute to identify species mitigation, protection, and restoration as project purposes equal in priority to the purposes of providing water for irrigation and domestic uses. § 3406(a), 106 Stat. 4714. In addition, the CVPIA directs the Secretary to:

> dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act.

§ 3406(b)(2), 106 Stat. 4715-4716. The 800,000 acre-foot allocation is subject to a reduction of up to 25 percent under certain circumstances. See CVPIA § 3406(b)(2)(C), 106 Stat. 4716.

5. The Bureau of Reclamation subsequently announced its initial allocations of CVP water for 1993, which provided that the Bureau would supply CVP agricultural contractors situated south of the Delta (including the Westlands Water District) with only 50 percent of their maximum contractual amounts. See Pet. App. 5a-6a. Petitioners filed a motion in the district court to enforce the 1986 judgment, claiming a right to purchase and use the full 900,000 acre-feet of water specified in the 1963 water service contract. See Pet. App. 6a. The government responded that the Bureau was allocating only 50 percent of the maximum contractual amounts in the 1993 water year to CVP agricultural contractors south of the Delta (including Westlands) because, among other things, the water that would have otherwise been supplied to contractors such as Westlands was needed to meet the Bureau's ESA and CVPIA obligations. See *id.* at 5a-6a, 27a-28a.

The district court ruled that Article 11 of the 1963 contract, which relieves the United States of any liability "from a shortage on account of errors in operation, drought, or any other causes," allowed the Bureau to deliver less than the full 900,000 acre feet to Westlands in the 1993 water year. See Pet. App. 23a-37a. The court concluded that to the degree that petitioners were asserting that the Bureau had unreasonably determined that the 1993 allocations were necessitated by the ESA and the CVPIA, those contentions should be resolved in a separate action, rather than in a proceeding to enforce the 1986 judgment. *Id.* at 35a-36a. The court noted that the Westlands Water District and others had already filed a suit raising similar contentions. *Id.* at 36a. The court therefore denied petitioners' motion without

prejudice, indicating that it could be renewed depending upon the outcome of the pending challenge to the Bureau's allocation. *Id.* at 37a.[2]

6. The court of appeals affirmed. See Pet. App. 1a-22a. It concluded that the unavailability of water resulting from the application of the ESA and the CVPIA was a "water shortage" within the meaning of Article 11 of the 1963 contract. It accordingly ruled that the contract did not obligate the Bureau to furnish the full 900,000 acre-feet amount to the Westlands Water District in years in which the Bureau could not supply that amount without breaching its ESA and CVPIA obligations. *Id.* at 7a-17a. The court of appeals also held that the district court had not abused its discretion by abstaining from resolving challenges to the reasonableness of the Bureau's 1993 water year allocations. *Id.* at 18a-22a. The court observed that those issues should be resolved in the Westlands Water District's pending suit, which "will enable a comprehensive judicial resolution of the allocation problem which affects many parties other than [petitioners]." *Id.* at 22a.

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[2] The court reaffirmed its rulings in a subsequent order, Pet. App. 38a-56a, specifically reiterating that contentions concerning the purported unreasonableness of the Bureau's 1993 allocations should be made in the separate pending suit, *id.* at 55a-56a. The district court has allowed petitioners and other entities to intervene in that suit, see *Westlands Water Dist.* v. *United States Dep't of Interior*, 850 F. Supp. 1388, 1394 n.2 (E.D. Cal. 1994). The court also entered a preliminary injunction against the Bureau, but the court of appeals vacated that injunction. See *Westlands Water Dist.* v. *Natural Resources Defense Council, Inc.*, 43 F.3d 457 (9th Cir. 1994).

ARGUMENT

1. Petitioners assert (Pet. 16-19) that the district court's decision to abstain on the issues concerning whether the Bureau's 1993 allocations were arbitrary and capricious deprived them of their due process rights to be heard at a meaningful time and in a meaningful manner. Petitioners, however, failed to raise that constitutional argument in the court of appeals. Hence, that argument may not properly be raised here. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

In any event, petitioners' due process contention is without merit. Petitioners assert that the district court's abstention decision was unconstitutional because it "effectively ordained that the adjudication of the existence or nonexistence of any statutory mandate would occur, if at all, after the water available for use during the 1993-1994 irrigation season could no longer be delivered." Pet. 19. But there is no reason to believe that the district court could have resolved the allocation issues more promptly in this case if it had not abstained. At the time that he ruled on petitioners' motion to enforce the judgment, the district judge already had the same issues pending before him in the Westlands Water District's suit, and he abstained because he concluded that it would be more efficient to litigate the issues in that suit, which involved numerous additional interested parties.[3] As the district judge explained,

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[3] Numerous other entities besides Westlands and the petitioners are participating as plaintiffs in that action. In addition, FWS and NMFS have been named as defendants in that suit. See *Westlands Water Dist.*, 850 F. Supp. at 1394-1398.

> Any challenges to the Bureau's method of compliance with ESA and CVPIA will undoubtedly involve extremely complex and time-consuming proceedings. Judicial economy is not served by proceeding in separate cases brought by parties with seemingly identical interests.

Pet. App. 56a. Hence, the judge, who was familiar with the pending proceedings, elected to manage his docket in the manner that he concluded would provide the most expeditious resolution of the pending claims. That decision is consistent with principles of due process. Petitioner advances no reasons for believing that the court could have adequately resolved the allocation issues with greater dispatch in this proceeding rather than in the action brought by the Westlands Water District. Under those circumstances, petitioners are not entitled to relief. Cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990) (holding that a court's failure to provide a detention hearing within a statutory time limit does not disable it from subsequently conducting a "prompt detention hearing").[4]

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[4] Petitioners state that "[t]he District Court and the litigants had spent considerable time and effort and, indeed, tried the statutory mandate questions before the second suit was filed." Pet. 29. Contrary to petitioners' assertion, the district court did not hold a trial. Rather, it heard argument on petitioners' motion to enforce the 1986 judgment. The issues regarding whether the Bureau had acted unreasonably in arriving at its 1993 allocations had been initially raised through petitioners' response to the government's opposition to petitioners' motion for enforcement of that judgment. Because the issues were initially raised in petitioners' response, filed just ten days before the scheduled hearing on petitioners' motion, the government did not have an opportunity to address them. If the

2. As petitioners acknowledge (Pet. 17), the issue of whether a federal district court may abstain from resolving matters that are pending in another case in the federal courts is a matter committed to the sound discretion of the district court judge. The district courts have broad powers over the management of cases in the interest of judicial economy and sound administration. As this Court stated in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952):

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.

Id. at 183-184. The court of appeals expressly applied the *Kerotest* standard to the situation presented by this case. See Pet. App. 19a.

Petitioners suggest (Pet. 28-29) that the court of appeals' decision is in conflict with the approach taken by the Second Circuit, which petitioner characterizes as following a "general rule * * * that the case first in time proceeds." Pet 28. Petitioners acknowledge, however, that the Second Circuit has also stated that its general "first in time" rule is subject to exception where circumstances, such as the "balance of convenience," warrant. *Ibid.* See

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district court had not abstained, it would have had to afford the government an opportunity to brief those issues, after which the court would have had to conduct a review based upon the administrative record.

Adam v. *Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). In this case, the court of appeals concluded that the district court acted properly in determining that the considerations of judicial economy and other relevant circumstances favored abstention. Hence, the court of appeals' decision presents no conflict with the Second Circuit's abstention practice.

3. The court of appeals' decision not only creates no conflict, but it is also correct. The district court did not abuse its discretion by directing that the issues concerning whether the Bureau properly applied the ESA and the CVPIA should be initially resolved in the Westlands Water District's pending suit. CVP water allocations affect numerous CVP water users in addition to the petitioners in this case. They also implicate the judgment of the Bureau, the FWS, and NMFS on highly technical matters. As the courts below recognized, litigation concerning those allocations should be resolved in a comprehensive proceeding that includes the many entities that have an interest in the matter. Piecemeal adjudication of those claims would result in needless duplication of judicial effort and potentially conflicting rulings or relief. The district court acted properly in consolidating the claims in one proceeding.

Petitioners assert (Pet. 19-26) that the district court should have abstained on the "statutory" issues only if it also abstained on the other issues that petitioners presented in their motion for enforcement of the judgment. The court acted appropriately, however, in light of the issues before it. The court was entitled to reject petitioners' most extreme argument that the contract and prior judgment flatly prohibited any reduction in petitioners' allocation. Petitioners placed that question of law squarely before the court,

and if they had prevailed on that issue, there would have been no need for the court to decide how best to resolve petitioners' challenges to the 1993 allocations. As petitioners themselves acknowledge (Pet. 18-19), it was in their interest to obtain a prompt ruling on whether they had an entitlement to 900,000 acre-feet without regard to the terms of the ESA and the CVPIA. Petitioners cannot reasonably complain that the district court expeditiously resolved that question in this proceeding.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JACQUES B. GELIN
ROBERT L. KLARQUIST
Attorneys

NOVEMBER 1995

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[5] The court explicitly preserved petitioners' right to seek additional relief depending on the outcome of the Westlands Water District suit. The court ruled that the 1993 allocations would not offend the water service contract and the 1986 judgment, provided that those allocations were based upon otherwise proper applications of the ESA and the CVPIA, and it indicated that petitioners could renew their motion if they established in the Westlands proceedings that the agency had acted improperly in setting those allocations. Pet. App. 37a; see also *id.* at 22a.